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No. 161

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In the Supreme Court of the United States

OCTOBER TERM, 1968

THE CHOCTAW NATION AND CHICKASAW NATION,
PETITIONERS

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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On October 28, 1968, the Court invited the Solicitor General to state the views of the United States in these consolidated cases.

Petitioners are the Choctaw Nation and Chickasaw Nation, two of the Five Civilized Indian Tribes in the Indian Territory (now Oklahoma). They instituted these three suits to secure possession of, quiet title to, and recover reasonable rentals for, three tracts of Ok-

lahoma land (consisting of some 200, 32 and 40 acres, respectively) which had been reserved from allotment to individual tribal members because of reservoir easements acquired by railroads through condemnation in 1902 and 1903, pursuant to the Enid and Anadarko Act of 1902 (32 Stat. 43, 47).[1] In 1906, Congress made provision for disposing of the affairs of the Five Civilized Tribes, after lands had been allotted to the individual members (Act of April 26, 1906, 34 Stat. 137). Section 14 of the 1906 Act (Pet. 3-4) provided that title to land reserved from allotment for the use of any person or corporation should revert to the tribe if such use were abandoned and disposed of as other surplus lands for benefit of the tribes. Railroad easements were, however, excepted. The second proviso of Section 14 permitted railroads to acquire title to lands subject to such easements by payment of the value thereof under regulations of the Secretary of the Interior. Upon failure so to acquire and cessation of such use by railroads, title was to "vest in the owner of the legal subdivision of which the land so abandoned is a part," except when the land was within a municipality. The railroads here never acquired such title and thereafter abandoned the easements. Nor are the lands involved located within a municipality. Accordingly, the courts below determined that, under the pertinent statute, title to the lands involved vested in the abutting landowners, and the court of appeals af-

[1] A more complete statement of the underlying facts and background is contained in the opinion of the court of appeals (see Pet. App. ii-iv).

firmed the district court's entry of judgment in respondents' favor (Pet. App. i-ix; 396 F.2d 578).

No warrant exists, in our view, for granting the instant petition. The problem presented is confined to the Five Civilized Tribes in Oklahoma and can only arise in the Tenth Circuit. In an unbroken line of decisions (*e.g.*, *United States* v. *Magnolia Petroleum Co.*, 110 F.2d 212 (C.A. 10); see Pet. App. iv, and cases cited in n. 12),[2] that court of appeals has consistently held that title to lands in these circumstances vests in the abutting landowners or, where relevant, in the appropriate municipality. No conflict of decisions thus exists or can ever develop. Nor is there any need for review by this Court in order to stabilize land titles. Indeed, revesting title in petitioners would be contrary to the intent of Congress to terminate tribal affairs, and unsettling to the Indian allottees and their successors in interest. Moreover, the decisions below plainly reflect the statutory mandate, since Congress did not specify that title to only narrow or small strips and gores of insubstantial value would so vest (see Pet. App. vi).

There are at least several answers to petitioners' claim of an unconstitutional taking by the United States. First, it would be inappropriate for this Court to reach and resolve that issue here, for the United States is not, and never has been, a party to these ac-

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[2] As the court below noted, in the *Magnolia Petroleum Co.* case, and similar earlier cases involving this issue, "the vesture of railroad right-of-way in abutting landowners was upheld as against the claim asserted *by the United States* on behalf of the Indians that upon abandonment title passed to the Indian tribes" (Pet. App. iv; emphasis added).

tions. Second, in providing that title to such lands be vested in abutting landowners, Section 14 of the 1906 Act simply set forth what an allotment of land subject to a railroad easement would include—title to the underlying fee if the railroad failed to acquire it or lost its right to do so through non-use of the easement. Thus, the 1906 Act did not take the property of petitioners and give it to another, any more than did the Atoka Agreement and ratifying acts providing for allotment of tribal property to individual members of the tribes and for lands for towns, cemeteries, schools, churches, etc., within Indian country (Curtis Act of 1898, 30 Stat. 505-513, as supplemented, 32 Stat. 641, 645, 652, 657). That legislation merely prescribed how the property was to be divided among the Indians themselves and used for their benefit. Management and control of the property of the Five Civilized Tribes was of course within the power of Congress. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-568; *United States* v. *Seminole Nation*, 299 U.S. 417, 428. In this connection, as the court below observed, the United States derived no benefit as a result of the easement abandonments (Pet. App. v).

In short, what Congress did was to individualize the holdings of tribal land, not to take such property. Incident to a plan for such individualization, Congress simply determined to permit abutting landowners—initially tribal members—to take the land covered by the railroad easements upon their abandonment, rather than to provide initially for the inclusion of these areas within the allotments of land to individual tribal members.

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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